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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Dated: New York, N. Y., October 5, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel M. Levy, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit which in an opinion affirmed a judgment of the District Court for the Southern District of New York for the plaintiff trustee in reorganization proceedings in an action brought in 1948 to recover money paid to the defendant in 1938 for his services as accountant rendered in a shareholder's action brought against the plaintiff's corporate predecessor.

A certified transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Statement

On April 25, 1936, defendant, an accountant, entered into an agreement with one Milton I. Milvy (Plaintiff's Exhibit 2, R. 47-48) under which defendant was to do accounting work in certain stockholder's derivative actions, in consideration of which Milvy, the attorney in said actions, was to pay him one-third of his gross fees. A subsequent agreement of January 4, 1938 (Plaintiff's Exhibit 3, R. 49-50) reembodied the old agreement. Defendant's obligation consisted only of rendering accounting services and giving consultation in the event of settlements. There is no provision giving defendant any control over such settlements. Defendant never worked on such stockholder's suits except after a specific request from Milvy (R. 16-17, 22).

Pursuant to such agreements, defendant rendered such services in a stockholder's derivative action against certain directors and officers of Associated Gas & Electric Company, plaintiff's corporate predecessor, hereinafter called "AGECO", and the defendant received $6,000 from Milvy with knowledge that it was being paid to him as part of the proceeds (approximately one-third) of the settlement of the said action, in four payments during the year 1938 (R. 63-4). The attorneys for AGECO, who were also officers and directors thereof, were told by Milvy of the payment of these moneys to defendant for his services (R. 18-19). No evidence was introduced to show that defendant was aware of any legal obstacle to his receipt of these moneys. Defendant's attorney inquired of defendant whether he ever had "any idea whatsoever that

you were under any duty to pay back any money to the corporation", but an objection to this question was sustained (R. 22).

Plaintiff is trustee in reorganization proceedings of the said company, the petition for reorganization having been filed on January 10, 1940 (R. 2). Plaintiff, an attorney, who is concededly an expert on legal subjects (R. 20), himself conceded that he did not believe that defendant was under any legal liability to him (R. 20). Defendant's attorney's inquiry of a predecessor trustee, Matthews, himself an attorney and one of the attorneys for plaintiff, as to whether he thought defendant was liable, was blocked by objection (R. 21). Defendant made his offer of proof that the said Matthews believed that defendant was under no duty to account to the corporation. *Ibid.*

No evidence was introduced to show concealment by defendant of receipt of the monies. Neither plaintiff nor any predecessor trustee of AGECO had any knowledge of receipt of monies by defendant nor could he have obtained such knowledge with due diligence prior to June 17, 1947 (R. 63-4), though the corporate predecessor had such knowledge (R. 18-19). This action was begun in July, 1948. No one ever asked defendant to pay back the money or even spoke to him about the matter prior to the demand served on him in June, 1948 (R. 22).

The District Court held that plaintiff had pleaded and proved a cause of action; that although defendant's conduct was not fraudulent and there was no concealment but merely silence, the two years federal bankruptcy statute of limitations* had not run in defendant's favor until this

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*"A * * * trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State Law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by Federal or State Law had not expired at the time of the filing of the petition in bankruptcy." §11(e), Bankruptcy Act, 11 U.S.C. §29(e).

plaintiff or a predecessor trustee had knowledge or should have known of the facts; that interest should be awarded from the dates of receipt of the monies by defendant. The Court of Appeals for the Second Circuit on July 16, 1951 affirmed the decision below.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254 subd. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is July 16, 1951.

Questions Presented

1. Whether the Court of Appeals for the Second Circuit erred in holding that the federal bankruptcy statute of limitations does not begin to run against a creditor until he learns or could reasonably learn of the debtor's liability to him, in the absence of fraud in fact or fraud in law, when the debtor has merely remained silent and has not committed any acts of concealment;

2. Whether the said Court erred in holding that the federal bankruptcy statute of limitations does not begin to run against a trustee in reorganization proceedings until he learns or could reasonably have learned of the debtor's liability, although the trustees' corporate predecessor knew all the facts of the transaction out of which the debt arose;

3. Whether the said Court erred in holding under the New York law that an accountant retained by an attorney in connection with certain actions for his professional services is a joint venturer with the attorney solely because he is to be paid on a contingency basis and is to be consulted in the event of settlement, though the accountant

had no control over the settlements and never worked on any case except upon the instructions of the attorney;

4. Whether the said Court erred in holding that under the New York law a person who renders services and receives funds representing the *res* of a constructive trust thereby becomes liable, though the person had no knowledge whatsoever of the existence of such a trust, and could not have had any such knowledge under the then state of the law;

5. Whether the said Court erred in holding that under the New York law a person is to be charged with interest from the date of receipt of the monies forming the *res* of a constructive trust though he has no knowledge of the existence of the constructive trust and though it was paid to him for services rendered and received without any knowledge that the creditor would ever assert any claim to it.

Reasons for Granting the Writ

1. The said Court of Appeals had decided a federal question in a way probably in conflict with applicable decisions of this Court, as well as in conflict with the decision of another Court of Appeals, in deciding that the two years federal bankruptcy statute of limitations [§ 11(e) Bankruptcy Act, 11 U.S.C. § 29(e)*] was tolled until plaintiff learned of defendant's receipt of the moneys, though no fraud or concealment of any sort was committed by defendant, who merely remained silent.

2. The said Court of Appeals has rendered a decision in conflict with an earlier decision of a different panel of the same Court, and in conflict with a later decision of another Circuit Court of Appeals on the same matter, in holding that the trustee plaintiff did not inherit his cause

* Quoted *supra* p. 3, footnote.

of action with the burdens of knowledge of the corporate predecessor, and so was barred by the statute of limitations.

3. The said Court of Appeals has decided several important questions of local law in a way probably in conflict with applicable local decisions, in deciding

a. That the trustee plaintiff was not charged with notice of defendant's receipt of the moneys which notice had been conveyed to the corporate predecessor, in probable conflict with two decisions of the New York Court of Appeals and a decision of an intermediate appellate court in New York;

b. That defendant was liable as a joint venturer under circumstances which the New York Court of Appeals has held not to be a joint venture;

c. That defendant who received money without notice of a constructive trust and for consideration was liable, in probable conflict with several decisions of lower New York courts;

d. That interest was properly awarded from the date of receipt of the moneys by defendant, in probable conflict with the decision of an intermediate appellate court of New York.

4. If for no other reason, this Court should review the decision below on the first-mentioned ground because of the tremendous implications of a decision holding that in cases not involving fraud, every federal statute of limitations is tolled until plaintiff learns of his right to sue, though defendant merely remains silent, thus utilizing an exception whose reason is to prevent fraud in cases where, there being no fraud, the reason ceases to exist.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of ~~and~~ this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and of all proceedings of the said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court below be reversed, and that the petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y.
October 5, 1951

SAMUEL M. LEVY,
By HERBERT MONTE LEVY
Attorney for Petitioner.

IN THE

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No.

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against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals is not yet reported. It appears at pages 87-93 of the record. The first opinion of the District Court is reported at 92 F. Supp. 512, and appears at pages 52-57 of the record; its opinion on rehearing (not yet reported) appears at pages 58-62 of the record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254 subd. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is July 16, 1951.

Statement of the Case

A statement of the case appears in the foregoing petition for the writ, and for the sake of brevity is here omitted.

ARGUMENT

POINT I

The decision of the Court of Appeals that the federal bankruptcy statute of limitations did not begin to run until plaintiff learned of defendant's receipt of the monies even in the absence of fraud and concealment is in probable conflict with a decision of this Court as well as in conflict with a decision of another Court of Appeals.

The Court below held that the situation in *Bailey* v. *Glover,* 21 Wall. 343 (1874), in which the statute did not run against plaintiff until he learned all facts, was precisely like that in this case, that the action there was by an assignee or trustee in bankruptcy, that in both cases each was to recover money which belonged to the bankrupt and which the defendant had converted, that in each the defendant had done nothing to cover up his guilt, and that in each there was no deceit. What the Court below did was to confuse plenary suits by a trustee on behalf of a corporation for breach of contract—the case at bar—with proceedings to set aside a concealed fraudulent conveyance, as in *Bailey.*

In the *Bailey* case, there was actual fraud and deception, as well as concealment. There had been a fraudulent misrepresentation that the transfer of property was a valid transfer, by which misrepresentation the defendant had been able to obtain a discharge. The case arose on demurrer to a bill in equity, by which defendant there admitted the fraud and concealment alleged in the bill. As the Court there stated, "* * * the bill contains a distinct allegation that the defendants kept secret and

concealed from the parties interested the fraud which is sought to be redressed * * * *Id.* at 348-9.

Nor is there any relevancy in the fact that the action in both cases is by an assignee or trustee in bankruptcy. Defendant's misrepresentation in *Bailey* was to the trustee; defendant here had no transactions with the trustee. Plaintiff's cause of action, if any, arose before the reorganization proceedings began, and defendant's misconduct, if any, was only against the corporation whose cause of action the trustee inherited. Nor is there any similarity between the case of an assignee in bankruptcy suing to set aside a fraudulent conveyance and a reorganization trustee suing to collect a claim of its corporate predecessor.

The gravamen of the action in *Bailey* was the defendant's action in making a conveyance deemed fraudulent in law as well as in fact. Defendant in the case at bar was not being sued for any conveyance, but rather for the receipt of monies; defendant in the case at bar did nothing which is or which a statute makes fraudulent.*

Thus, the only similarities between this case and *Bailey* v. *Glover* are that the defendant had acted wrongfully and that the assignee or trustee had failed, but not through lack of diligence, to discover the transfer within the period of limitation. In such cases, the statute does run against the plaintiff.

The opinion in *Bailey* v. *Glover* rests on the philosophy that statutes of limitations being "enacted to prevent frauds", permitting the statute to run while concealed

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* While it may be true that participation in settlement of a stockholder's suit knowing that it is settled with the moneys of the corporation may be the equivalent of fraud (*Erie Railway Co.* v. *Vanderbilt*, 5 Hun 123 (Gen. T., 1st Dept., 1875), defendant here did not participate in the settlement. Milvy, who did the settling, made inquiries to make sure the directors were paying their own money; he was assured that they were, and the case was settled (R. 18).

fraud remained undiscovered "is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id.* at 349. But the reason for this rule—the prevention of fraud—ceases when, as here, there is neither fraud nor concealment. In such a case, the statute of limitations, whose very purpose it is to prevent fraud, must be strictly applied. This was the holding of this Court in *Avery* v. *Cleary,* 132 U. S. 604 (1890), which was, as in *Bailey,* an action brought by an assignee in bankruptcy.

Avery v. *Cleary* was an action by the assignee in bankruptcy of one Ellis against the administrator of Ellis' estate. Before filing his petition in bankruptcy, Ellis had assigned certain insurance policies in trust for his daughter to one Morse. But the bankruptcy schedules made no mention of the policies. And when Ellis died, the insurance company paid the proceeds of the policy to Ellis' administrator.

Plaintiff's declaration alleged that the policies had passed to the assignee, that their existence had been concealed and withheld, that they were in defendant's possession, and that the assignee had no knowledge or information concerning the policies until shortly before bringing the suit. The answer put the material allegations of the complaint at issue, and pleaded that the action did not accrue within two years before the suing out of plaintiff's writ. The lower court rendered judgment for the plaintiff.

The trial court had been requested to charge the jury that the action was barred by the then two years bankruptcy statute of limitations, unless the defendant had fraudulently concealed the alleged cause of action, and that mere omission to report to plaintiff did not amount to fraudulent concealment; and that mere ignorance would not take the case out of the statute of limitations. This

request to charge was denied. The Supreme Court reversed the judgment, holding that these instructions should have been given. Said the Court:

> "It is * * * barred by limitation, unless it can be brought within the rule announced in *Bailey* v. *Glover* * * *." *Id.* at 609.
>
> "The ground upon which the plaintiff claims exemption from the limitation of two years is that the schedules in bankruptcy omitted all mention of the policies in question, and that the fact that the policies existed was 'concealed and withheld' by the bankrupt in his lifetime, and, since his death, by his administrator.
>
> "If it be assumed that Ellis had not, prior to his bankruptcy, delivered the assignment * * *, and that his interests and rights in these policies were transferable to his assignee, *the mere fact that he omitted any mention of the policies in his schedules in bankruptcy, and that neither he nor his administrator gave information of them to the assignee, would not establish fraud within the meaning of the rule announced in Bailey* v. *Glover.* The omission from the schedules of any reference to the policies, and the failure to call the attention of the assignee to them, may have been caused by an honest belief, upon the part of Ellis, that they belonged to his children, or were not such property as the law required to be surrendered to the assignee * * *. Fraud is not imputable to (the children), nor to the guardian, simply because neither they nor he informed the assignee in bankruptcy of their claims. *Their silence, when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee, did not amount to concealment.* They did nothing to prevent him from obtaining full information in reference to the assets of the bankrupt. The record discloses no circumstances tending to prove that they

sought to keep their claim from the knowledge of the assignee." *Id.* at 610-611. (Emphasis supplied.)

That the case at bar is an *a fortiori* case is demonstrated by the following comparison:

	Avery v. *Cleary*	*Dabney* v. *Levy*
1.	Defendant omitted any mention of the policies in his schedules.	Defendant made no mention of the receipt of money; he was never under any duty to furnish any schedules whatsoever.
2.	The omission may have been caused by an honest mistake of law.	The receipt of the moneys and the omission were caused by an honest mistake of law. Defendant in addition offered such proof (22); plaintiff, indeed—admittedly a legal expert—testified he believed defendant was not liable to plaintiff (20).
3.	Silence does not amount to fraudulent concealment when there is no duty to speak and defendant is unaware of any claim being asserted.	Silence does not amount to fraudulent concealment when there is no duty to speak and defendant is unaware of any claim being asserted.

The *Avery* case went on to state in dictum (for the only issue before the Court was whether the requested charges on silence not being equivalent to fraudulent concealment should have been given) that plaintiff could have with due diligence ascertained the facts. But this was entirely apart from the question with which we are concerned. As this Court stated, "A critical examination of the evidence leaves no room to doubt that, *apart from any question as to concealment upon the part of the bankrupt or*

his administrator, the assignee did not show such diligence as entitles him to exemption from the limitation * * *." (Emphasis added), 132 U. S. 604, 611-12. This Court went on to state *obiter* that the Court below would not have erred had it given a peremptory instruction to find for the defendant upon the issue in this regard.

The Court below attempted to distinguish *Avery* v. *Cleary* on the grounds that "if Levy was 'unaware' of any legal obligation, he was incapable of all moral sensibility * * *". But there was not one scintilla of evidence in the record to show that he Levy was aware of any legal obligation. Had Levy consulted the judges of the Appellate Division of the Supreme Court, First Department, New York's intermediate appellate court, in 1946, they would have unanimously told him that he was under no duty to pay back the monies to the corporation, for in *Clarke* v. *Greenberg,* 270 App. Div. 923, they unanimously ruled that even a stockholder who recovers proceeds in a derivative action is not required to account to the corporation. Had he consulted the plaintiff, a legal expert, he too would have told him—as he stated on the trial—that he was not under a legal liability (R. 20). And indeed had he consulted the attorneys for the plaintiff, they too would have told him that he was under no legal liability (R. 21). *Clarke* v. *Greenberg,* even when decided by the New York Court of Appeals, 296 N. Y. 146 (1947), merely held, in reversing the Appellate Division, that a shareholder bringing a shareholder's action must account to the corporation for the proceeds of the action. This was indeed the first judicial utterance anywhere to contradict the Appellate Division's finding of nonliability in such cases. *Note,* 37 Minn. L. Rev. 180, 182. It is common knowledge that the entire Bar believed, prior to the N. Y. Court of Appeals decision, that the shareholder and his

attorneys could legally retain the settlement proceeds. The Court below in the case at bar in addition created a completely new judicial doctrine, (which defendant could hardly have been aware of before 1951) when it held liable the accountant paid for his services by the shareholder's attorney. This Court's comment in *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939) is entirely apposite:

> "It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged law according to the language later used by the court." *Id.* at 456.

Surely a layman cannot be charged in fact with knowledge of liability if New York's intermediate appellate court, plaintiff's attorney, and plaintiff himself would tell him he had none, especially since there was no evidence whatsoever that Levy was aware of any legal obligation. Levy was no more "incapable of all moral sensibility" than are plaintiff, his attorneys, and the five justices of the Appellate Division of the New York Supreme Court.

Defendant has never contended that *Avery* v. *Cleary* overruled *Bailey* v. *Glover.* Defendant merely contends that *Avery* v. *Cleary* shows conclusively that in cases not involving fraud, as in the case at bar, the statute begins to run in spite of the silence of the defendant where there is no concealment.

The decision of the Court below is, moreover, in conflict with a decision of the Court of Appeals for the Fifth Circuit, which held in *Arkansas Natural Gas Co.* v. *Sartor,* 78 F. 2d 924, cert. den., 296 U. S. 656, that concealment by defendant only by silence is not enough to toll the statute of limitations. As the Court there stated at page 929:

> "Statutes of limitation are founded on public policy and are favored in the law. Mere ignorance of

one's rights will not toll the statute of limitations. *Concealment by defendant only by silence is not enough.* He must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry. * * * *We know of no decision, either of controlling authority or persuasive, holding that mere ignorance on the part of the creditor will toll the statute.*" (Emphasis supplied.)

POINT II

The panel of the Court of Appeals below, in holding that the trustee plaintiff did not inherit his cause of action with the burdens of knowledge of the corporate predecessor, rendered a decision in conflict with an earlier decision of a different panel of the same court, and in conflict with a later decision of another Court of Appeals for a different circuit.

If knowledge of receipt of the moneys by defendant is attributed to plaintiff, clearly there is no such ignorance of the facts as to suspend the running of the statute even were this a case of fraud. That such knowledge must be attributed to plaintiff is apparent from the fact that receipt of the money by defendant was known to the attorneys for the corporation, who were also directors and officers thereof. A different panel of the same Court of Appeals imputed such knowledge to the corporation in *Laird* v. *United Shipyards,* 163 F. (2d) 12 (1947) (a case in which this Court denied certiorari, 332 U. S. 842 (1947)), a case where those derelict in their duty were in control of the corporation, and the same Court has imputed notice to a receiver upon his appointment. *Michelsen* v. *Penney,* 135 F. (2d) 409 (1943). Such knowledge would thus be imputable to plaintiff here in 1940, the time when the first

trustee was appointed, and plaintiff is thus barred from suit brought here in 1948.

And only last August 14, 1951, the Court of Appeals for the Third Circuit held that a trustee in bankruptcy takes his causes of action burdened with all the liabilities of his predecessor. Said the Court:

> "When the trustees began to perform the contract, they elected to stand in the Debtor's shoes. Upon completion of the contract the trustees had the right to receive $75,000 less $10,000 because they took the Debtor's property 'with all the liabilities attached', encumbered by all the Debtor's acts and subject to all the equities to which it was liable." *In re Italian Cook Oil Corp.,* No. 10,334, p. 5 (slipsheet opinion, not yet officially reported).

When the trustee here elected to stand in the shoes of the Debtor by suing on the alleged implied contract that had been made with it by defendant, he too is encumbered by the Debtor's knowledge and subject to this defense. If the "contract" on which plaintiff sues is indeed to be "implied instanter", as the Court below held (R. 93), then surely the knowledge that the corporation had at that moment must also be attributed to it "instanter" as well as to its successor, the present plaintiff.

POINT III

The Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions, in deciding that the trustee plaintiff was not charged with the notice of defendant's receipt of the moneys had by plaintiff's corporate predecessor.

The New York Court of Appeals, New York's highest court, has twice ruled, in cases in which the plaintiff was a successor trustee, that the statute of limitations is not tolled when the corporate predecessor had knowledge, even where the only individuals having such knowledge were the guilty ones in control of the corporation. *Hastings* v. *Byllesby & Co.* (*Haystone*), 293 N. Y. 404 (1944) (relied upon by the other panel of the Court below in *Laird* v. *United Shipyards, supra*); *American Cities Power & Light Corp.* v. *Williams,* 74 N.Y.S. 2d 369 (Sup. Ct. 1947), unan. affd., 80 N.Y.S. 2d 357 (1st Dept., 1948), leave to appeal denied, 298 N. Y. 931 (1941). See also *Turner* v. *American Metals Co.*, 36 N.Y.S. 2d 356, 381 (Sup. Ct. N. Y. Co. 1942), rev'd on other grounds, 268 App. Div. 239 (1st Dept., 1948), app. dismissed, 295 N. Y. 822 (1946).

The law in New York is also clearly spelled out in Section 48(5) of the New York Civil Practice Act, which reads as follows:

> "The following actions must be commenced within six years after the cause of action accrued:
>
> • • •
>
> (5) An action to procure a judgment on the ground of fraud. *The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.*" (Emphasis supplied.)

Thus, were this to be considered a fraud case, the action in New York would be deemed to have accrued upon the discovery by the corporate predecessor of plaintiff—the person "under whom" plaintiff "claims"—of the facts, which discovery took place in 1938. Clearly plaintiff is barred from suit here.

POINT IV

The decision below that defendant was a joint venturer with plaintiff is in probable conflict with an applicable decision of the New York Court of Appeals.

The Court below rejected the defense that Levy was not charged with notice of Milvy's constructive trust and that he held the moneys received as a bona fide purchaser based on the work he did for Milvy, because the agreement between them made the prosecution of the suit a joint venture between them. In finding such a joint venture, the Court relied on the provisions in the agreements (1) that Milvy was to consult Levy in event of settlement, (2) that Levy was to be paid on a contingency basis out of the proceeds. But this holding of the Court was in probable conflict with the decision of the New York Court of Appeals in *In re Grapel* v. *Hodges,* 112 N. Y. 419 (1889), in which it was held that a venture was not joint even though the employee was to be paid on a contingency basis out of the proceeds. True, there was nothing in the agreement construed in *Grapel* about consultation—there could not be for there the employee had the untrammeled greater right to make settlement himself —but there is nothing in the record of this case to show that consultation by Milvy of Levy was for any other purpose than securing his professional advice as an em-

ployed accountant. Defendant had no control over settlements, and never worked on a case until Milvy asked him to (R. 16-17, 22). The consultation provision can hardly turn a contract for services rendered into a joint venture, since assuredly the right of an employer to consult an expert employee is implicit in every agreement of employment.

POINT V

The decision below that defendant was liable though he received money without notice of a constructive trust and for consideration was in probable conflict with several decisions of New York courts.

A. Mere receipt of moneys forming the subject of a constructive trust does not render one liable, unless he has notice that the fiduciary from whom the funds were received was violating his trust. As the highest New York Court to speak on this subject said, in discussing the right of a plaintiff to recover from the transferee moneys allegedly diverted from trust purposes,

> "That can only be done if the recipients took these payments with notice or knowledge that these were trust funds, and that such funds had been improperly diverted. *Mere knowledge as to the source of the moneys is not sufficient—there must also be knowledge of the violation of a trust duty.*" (Emphasis supplied.) *Bonham* v. *Coe,* 249 App. Div. 428, 433 (4th Dept., 1937), affd., 276 N. Y. 540.

No evidence was ever introduced to show that defendant ever had such knowledge (see *supra,* pp. 15-16). No such evidence could have been introduced, for it was not until 1947—when the statute of limitations had already run—

that the New York Court of Appeals reversed *Clarke* v. *Greenberg*. It was then that lawyers no less than laymen were advised for the first time that funds received under such circumstances should be returned.

B. Even if defendant had such knowledge, he would not be liable under the New York cases since he received the funds in the ordinary course of business, either for a new consideration or for an existing debt [*Justh et al.* v. *Nat. Bk. of the Commonwealth*, 56 N. Y. 478 (1874); *Newhall* v. *Wyatt*, 139 N. Y. 452 (1893)], even when it is to his knowledge trust funds for the services he rendered [*Skinnell* v. *Mahoney*, 197 App. Div. 808 (2d Dept., 1921)].

C. The Court below in effect distinguished these cases on the ground that defendant was a joint venturer with Milvy, the fiduciary. However, such a holding is in probable conflict with another decision of the N. Y. Court of Appeals (see POINT IV, *supra*, pp. 20-21).

POINT VI

The decision below that interest should be awarded from the date of receipt of the moneys by defendant is in probable conflict with the decisions of two intermediate appellate courts of New York.

In each of the cases cited by the Court below for its affirmance of an award of interest of about 75% of the amount of the judgment, there was fraud. No New York Court has ever awarded interest from the date of receipt of the moneys by a defendant in a case such as this not involving fraud.

Even were payment to defendant made under duress and involuntary, interest would run only from the date of demand, not from the date of payment. *Amer. Dist. Tel.*

Co. v. *N. Y.*, 213 App. Div. 578 (1st Dept., 1925). If plaintiff there was not entitled to interest from the date of payment of the funds in question when payment was involuntary, certainly plaintiff here is not entitled to interest from such date when payment was voluntary, when interest at most would begin to run only from the date the action was begun.

But under the circumstances of this case, defendant is not liable for any interest whatsoever. The following portion of the opinion in *Evans* v. *Garlock*, 37 Hun 588 (5th Dept., 1888), where the question was whether defendant was entitled to interest on her claim against plaintiff, enunciates the rule and its rationale:

> "It (interest) is allowed where the circumstances are such as to show that as between the parties the one recovering is equitably entitled to it; and as a rule it will be charged to a trustee who has used the trust fund, been negligent in paying it over or investing it. * * * The plaintiff was not conventionally a trustee. *The money came to him under circumstances which enabled him to understand that it was his and paid to him on a debt justly due.* And it is not apparent why he should be charged with interest on the money until he was in some manner in default. * * * *he had no knowledge* * * * *that she (defendant)* * * * *would assert any claim to it.* The case does not seem to come within any principle which should charge the plaintiff with interest." *Id.* at 592-3.

Note how applicable are those words to this case! Here, too, the money came to the person sought to be charged with interest under circumstances which he understood to be payment to him on a debt justly due; here too he had no knowledge that his opponent-to-be would ever assert any claim to it. Thus, it is clear that under this case the plaintiff has no right to interest *at all.*

It is true that Section 480 of the New York Civil Practice Act, quoted below,* giving plaintiff a right to interest in actions involving breach of contract, was passed after *Evans* and *American District* were decided. But this section does not presume to state when interest begins to run, so that it must be presumed to have approved or at least not have overturned the doctrine of these cases. Certainly a statutory intention to overrule these cases cannot be implied from the wording of this statute.

If the theory of recovery of the Court below is that this is an action for breach of contract, its argument that the statute of limitations did not begin to run against plaintiff until he learned of receipt of the moneys by defendant is invalid. This is not a fraud action in one breath and a contract action in another. It is, in fact, neither; it is rather an action in quasi-contract for money had and received. Plaintiff cannot therefore recover interest from the dates of such receipt.

CONCLUSION

The petition for a writ should be granted.

Dated: New York, N. Y.,
October 5, 1951.

Respectfully submitted,

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Attorney for Petitioner,
Samuel M. Levy.

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* "In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum * * *."

Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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